No. _____

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

On Petition For Writ of Certiorari to the
New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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4118

QUESTION PRESENTED

Does a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute a waiver of his right to trial within such period?

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JURISDICTION

The judgment of the New York Court of Appeals was entered on November 18, 1998. The jurisdiction of this Court is invoked under 28 USC §1257(a):

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATUTES INVOLVED

Interstate Agreement on Detainers - NY Criminal Procedure Law §580.20 (McKinney 1995) (set out in full in Appendix at page A-17) The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within Art I, §10 of the United States Constitution (Cuyler v Adams, 449 US 433 [1981]). The federal enactment of the IAD is at 18 USC App 2.

STATEMENT OF FACTS

Petitioner asks this Court to review an order/judgment of the New York Court of Appeals reversing an order of the New York Supreme Court, Appellate Division, Fourth Department and dismissing the murder indictment against respondent.

This appeal stems from an incident which occurred in the Rochester, New York suburb of Gates on New Year's Eve 1992 in which respondent and three companions robbed and shot to death Michael Weeks at a motel. (The codefendants Earl Williams, Jeffrey Tobias and Dearco Hill were similarly convicted at separate trials.) Respondent was incarcerated on a criminal conviction in Ohio when he was brought to New York to face these charges in May 1994. Respondent had been advised of the New York detainer and initiated the process for his return to New York pursuant to Article III of the Interstate Agreement on Detainers (IAD) (NY Criminal Procedure Law §580.20 [Appendix, p A-17]). Following pretrial motions and hearings the court, on January 9, 1995, set the matter for trial on May 1, 1995 with the express agreement of both the People and respondent, as reflected in the following colloquy:

> MR. PROSPERI [the prosecutor]: Your Honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date. And Mr. Huether says that would fit in his calendar.
>
> THE COURT: How is that with the defense

counsel?
MR. SCANLAN: That will be fine, Your Honor.

Just a few days before trial then respondent brought a motion to dismiss the indictment pursuant to the IAD. He contended that he had not been brought to trial within 180 days of his request for disposition of the charges under the Agreement. The People opposed dismissal, contending that there were a number of excludable periods such that the time limit was not violated. While the parties debated whether various periods of time were excludable, the court ultimately concluded that the dispositive time period was from January 9, 1995 (when, as noted, a trial date was set [for May 1, 1995]) to April 17, 1995 when respondent brought his dismissal motion (the court issued its written decision on the motion on May 2, 1995, the day before trial actually began). (Thereafter on appeal both sides would agree that this was the dispositive time period.) The court ultimately denied the motion in a written, published decision (People v Reid, 164 Misc2d 1032, 627 NYS2d 234 [NY Co Ct (Monroe Co) 1995]) (A-11). (Respondent was indicted as "Michael Hill a/k/a Dwain Reid"; the trial court captioned the matter with these names reversed but the appellate courts used the name "Michael Hill" only.) The court concluded that respondent had waived his right to trial within the 180-day period by expressly participating in setting the trial date beyond this period. The court noted that at the time the trial date was set the 180-day period had not expired and that the trial could have been held within this period if respondent so desired. Respondent was subsequently convicted, following a jury trial, of murder in the second degree and robbery in the first degree and sentenced on June 8, 1995 to concurrent, indeterminate terms of incarceration of 25 years to life on the

murder conviction and 8 1/3 to 25 years on the robbery conviction.

On appeal respondent raised the sole issue of whether the trial court erred in declining to dismiss the indictment for lack of a timely trial under the IAD and on November 19, 1997 the New York Supreme Court, Appellate Division, Fourth Department unanimously affirmed for the reasons stated in the decision of the trial court (People v Hill, 224 AD2d 927, 668 NYS2d 126, 693 NE2d 755 [NY App Div (4th Dept) 1997]) (A-9-10).

On further appeal (by permission) then the New York Court of Appeals on November 18, 1998 unanimously reversed the order of the Appellate Division and dismissed the indictment against respondent, concluding that respondent's concurrence in the later trial date did not constitute a waiver of his speedy trial rights under the IAD (People v Hill, 92 NY2d 406, 1998 WL 796865 [NY 1998]) (A-1).

ARGUMENT

This Court should grant review herein because the decision of the New York Court of Appeals addresses an important issue regarding interpretation/application of federal law - the Interstate Agreement on Detainers - which has not been but should be settled by this Court, and also because the decision directly conflicts with decisions on the same issue from the high courts of other states.

The IAD, as an interstate compact, is in essence a federal statute and thus its construction is a matter of federal law; this Court has itself addressed the IAD on occasion (e.g., Reed v Farley, 512 US 339 [1994]; Fex v Michigan, 507 US 43 [1992]; Carchman v Nash, 473 US 716 [1985]; Cuyler v Adams, 449 US 433 [1981]).

The narrow yet important issue presented by this case is whether a defendant's express participation in setting and thus agreement to a trial date beyond the statutorily-required 180-day period under the IAD constitutes a waiver of his right to be tried within such period. The time of trial is the core component of the IAD and obviously nothing more directly impacts such than a meeting of the court and the parties for the very purpose of setting a trial date. Here, although defense counsel's (and the prosecutor's) input as to the selection of a trial date was expressly sought by the court and counsel affirmatively agreed to a post-180-day date, the New York Court of Appeals held that this was "mere concurrence in the suggested date" which did not constitute an "affirmative request" for a trial beyond the statutory period and thus could not be deemed waiver. With all due respect to that Court, such reasoning defies common sense and indeed conflicts with reasoning employed by other state high courts as well as federal appellate courts.

Even assuming that the proper test for determining if a

waiver occurred is, as the Court of Appeals stated, whether there was an affirmative request for treatment that is contrary to or inconsistent with a defendant's IAD speedy trial rights, surely a defendant's express involvement in the setting of a trial date must be considered "affirmative" conduct. Here the court actively invited defense counsel's participation in determining a mutually agreeable trial date. Counsel had every opportunity for input into the trial date determination; it was not forced upon him by the court. The Court of Appeals decision suggests that if respondent had been first to "propose" the trial date then such would have amounted to an affirmative request and thus a waiver, but because the court spoke first there could be no waiver, even though it was clear that respondent had every opportunity to reject the proposed date and to suggest an alternative date. This simply cannot be; it is illogical and serves no purpose but to promote gamesmanship by, e.g., encouraging attorneys to wait to see who is "first" to mention a trial date. It should be readily apparent that the outcome of an entire case – conviction or instead dismissal (and indeed this was a murder case) – should not turn on a point so fine that it amounts to nothing more than hypertechnical semantics.

In Moon v State (258 Ga 748, 375 SE2d 442 [Ga 1988]) the Georgia Supreme Court held that a defendant's agreement to a trial date beyond the prescribed period constitutes a waiver under the IAD. In State v Greenwood (665 NE2d 579 [Ind 1996]) the Indiana Supreme Court held that a defendant's failure to object to a trial date which was beyond the 180-day period constitutes a waiver under the IAD. The Indiana Supreme Court had applied the same rule in an earlier case, Reed v State (491 NE2d 182 [Ind 1986]), a case which was ultimately considered by this Court on federal habeas review (Reed v Farley, 512 US 339, supra). The issue addressed by this Court was the availability of habeas review of IAD claims -

the Court found such generally unavailable - and thus it did not directly consider the substantive underlying issue of waiver vis-a-vis a defendant's role in the setting of a trial date. Instead, Justice Ginsburg, with the Chief Justice and Justice O'Connor joining, merely found that because defendant had obscured the IAD's time prescription and avoided clear objection until the clock had run there was no cause for collateral review since there was merely an unwitting judicial slip, without aggravating circumstances, which did not rise to the level of a fundamental defect resulting in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure (id., at 348-349). The other Justices of this Court, however, were of the view that Justice Ginsburg either did or may have addressed waiver (id., at 356 [Scalia and Thomas, Justices, concurring in part and concurring in the judgment], and at 370-371 [Blackmum, Stevens, Kennedy and Souter, Justices, dissenting]), but they themselves did not decide the issue now squarely presented by the instant case.

Other state high courts, in contrast, have held that a defendant's "mere silence" in the face of the court's setting of an untimely trial date does not constitute waiver (e.g., State v Dolbeare, 140 NH 84, 663 A2d 85 [NH 1995]; Roberson v Commonwealth, 913 SW2d 310 [Ky 1994]). Here of course there was hardly "mere silence" on defense counsel's part yet the New York Court of Appeals effectively treated the matter as if there were. This problem of seemingly inconsistent interpretation and application of the concept of waiver in connection with setting a trial date is perhaps most pointedly evidenced by People v Allen (744 P2d 73 [Colo 1987]), a Colorado Supreme Court decision relied upon by the New York Court of Appeals (see, A-7). As the dissenting Justices in Allen pointed out, the majority there held that a waiver can be evidenced by affirmative conduct and that a defendant may

waive his speedy trial rights by freely acquiescing in a trial date beyond the statutory period, yet although this is exactly what happened in the case (twice, no less) the majority refused to find waiver. In the words of the dissent,

> "A defendant should not have the right to participate in the setting of a trial date beyond the speedy trial period and then claim a violation of the speedy trial provision"
> (People v Allen, supra, at 79 [Vollack, J., dissenting]; see also, State v Dolbeare, 140 NH 84, 87, 663 A2d 85, 87, supra [Thayer, J. and Brock, C.J., dissenting]).

This is all the more so in a case such as the instant one where it was respondent who initiated the process for his return for trial under the IAD (pursuant to Article III); this was not an Article IV case where the prosecutor initiates the return.

Furthermore, it is not even entirely clear that the proper test for waiver is that of an "affirmative request" for treatment contrary to the IAD. Some federal appellate courts (to which the state courts often look for guidance on this issue) talk about waiver being an affirmative request for treatment contrary to the IAD (e.g., Yellen v Cooper, 828 F2d 1471 [10th Cir 1987]; Brown v Wolff, 706 F2d 902 [9th Cir 1983]; United States v Odom, 674 F2d 228 [4th Cir 1982], cert denied 457 US 1125 [1982]; United States v Eaddy, 595 F2d 341 [6th Cir 1979]) while others talk about it being any action that was expressly or impliedly inconsistent with the provisions of the IAD (United States v Lawson, 736 F2d 835 [2nd Cir 1984]). However, in the case often cited for the "affirmative request" test, United States v Eaddy (supra), the court tied such test to the condition that defendant be unaware of his rights under the IAD; here as previously noted respondent was aware of his right to a speedy trial because he was the one who initiated his return to New York under Article III of the IAD for the very purpose of

obtaining a speedy trial. Moreover, even a court applying the "affirmative request" test has found that a defendant's "agreement" to continuances of trial amounts to action "contrary" to the IAD's speedy trial provisions and thus waiver (Brown v Wolf, 706 F2d 902, 907, supra). However, regardless of the terms in which the proper "test" for waiver is described, surely the concept of waiver must be deemed to encompass a defendant's express participation in and agreement to the setting of the trial date beyond the prescribed period.

It is imperative that this Court address this issue and resolve the analytical conflict among jurisdictions, since at present the exact same factual scenario could have drastically different results - a defendant could, e.g., be convicted of murder and sentenced to death or instead have the case dismissed and go free - depending solely on the jurisdiction in which the matter arises because those jurisdictions construe the very same law differently. Indeed, as noted there is conflict on this issue not only among different jurisdictions but even among individual judges of the same courts of individual jurisdictions. The whole purpose of the IAD is to ensure prompt trials and thus its key provisions are those establishing actual time periods for trial (180 days under Article III, 120 days under Article IV), and nothing more directly impacts the actual time of trial than the setting of the trial date. The issue herein thus goes to the very heart of the IAD - an interstate compact whose uniformity of application in this regard is essential but currently lacking. "The IAD's purpose . . . can be effectuated only by nationally uniform interpretation" (Reed v Farley, 512 US 339, 348, supra). It is therefore respectfully requested that review be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

State of New York
Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent, v MICHAEL HILL, Appellant.

Argued October 15, 1998; decided 18, 1998

Edward J. Nowak, Public Defender of Monroe County, Rochester (*Stephen J. Bird* of counsel), for appellant.

Howard R. Relin, District Attorney of Monroe County, Rochester (*Robert Mastrocola* of counsel), for respondent.

Chief Judge KAYE.

The core issue before us on this appeal is whether defendant, in concurring in the court's suggested trial date set beyond the 180-day period mandated by the Interstate Agreement on Detainers (IAD) (CPL 580.20), waived his right to a speedy trial under that statute. Concluding that no waiver was effected, we grant defendant's motion to dismiss the indictment for violation of the statute's speedy trial provisions.

In December 1993, Monroe County law enforcement officials lodged a detainer[1] against defendant, then incarcerated

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1 A detainer is ' "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another

at the Lorain Correctional Institution in Grafton, Ohio. The detainer notified the Ohio authorities that defendant was wanted for committing murder in the second degree and robbery in the first degree in Monroe County. After learning of the detainer, defendant exercised his rights under Article III of the IAD and formally requested a final disposition of the untried New York charges. Defendant's request was delivered to the Monroe county court and prosecutor on January 10, 1994, triggering IAD speedy trial provisions requiring defendant to be tried within 180 days.

Defendant was formally indicted on March 11, 1994. Two months later, in May, defendant filed several pre-trial motions. The court ruled on those motions in December 1994 and shortly thereafter, on January 9, 1995, the prosecutor and defense counsel appeared in court to fix a trial date. Addressing the Judge, the prosecutor noted that it was his understanding that "the Court may have preliminarily discussed a May 1st [trial] date." The prosecutor informed the Judge that May 1 was a convenient date for the People to begin trial. The court then inquired: "How is that with the defense counsel?" Defendant's attorney respondent: "That will be fine, Your Honor."

On April 17, 1995 – 468 days after Monroe County authorities received defendant's notice of request for final disposition – defendant moved to dismiss the indictment,

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jurisdiction" ' (*United States v Mauro*, 436 US 340, 359). The term has also been defined as "a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer" (Council of State Governments, Suggested State Legislation Program for 1957, Agreement on Detainers, at 74).

arguing that the prosecution had failed to bring him to trial within the 180-day statutory speedy trial period. Denying that motion, the trial court held that defendant had waived his speedy trial rights by concurring in the May 1 trial date, which was beyond the statutory period (164 Misc2d 1032). Defendant was subsequently convicted, after a jury trial, of murder in the second degree and robbery in the first degree. The Appellate Division affirmed. We now reverse.

Discussion

Prior to adoption of the IAD in 1957,[2] there were no formal procedures governing detainers. A law enforcement official interested in prosecuting an individual incarcerated in another jurisdiction would simply file a detainer with prison authorities in that jurisdiction advising them that charges were pending and requesting notification when release of the prisoner was imminent. Once a detainer was filed, neither the requesting nor the custodial authority was legally bound to act up it (*see generally*, Note, *The Interrelationship Between Habeas Corpus and Prosequendum, the Interstate Agreement on Detainers, and the Speedy Trial Act of 1974: United States*

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2 First suggested in 1948 by various correctional organizations, the IAD was developed over a considerable period of time. The specific language ultimately included in New York's Criminal Procedure Law was drafted by an interstate conference on correctional problems held in 1956 under the joint auspices of the American Correctional Association, the National Probation and Parole Association, the Council of State Governments and the Joint Legislative Committee on Interstate Cooperation (*see*, 1957 NY Legis Doc No. 46, Appendix III-A, at 178). Over the years, the majority of jurisdictions, including the Federal government in 1970, have adopted the IAD.

v Mauro, 40 U Pitt L Rev 285, 289 [1979]; Note, *The Interstate Agreement on Detainers: Defining the Federal Role*, 31 Vand L Rev 1017, 1021 [1978]). Indeed, as a practical matter it was virtually impossible for the State lodging the detainer to obtain custody of the inmate prior to completion of sentence in the confining State; the necessary procedures were cumbersome and expensive, and thus seldom invoked (Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 Hofstra L Rev 493, 497 [1978]). Moreover, a prisoner's demand to be tried pursuant to a detainer on charges outstanding in a jurisdiction other than the State of incarceration had no legal effect because there were no procedures to compel transfer to the State that had filed the detainer (*see*, Council of State Governments, Suggested State Legislation Program for 1957, Agreement on Detainers, at 78).

Detainers lodged under the old system, therefore, inevitably gave rise to speedy trial problems.[3] By the time the

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3 Other problems were identified as well. For example, the lodging of a detainer against an inmate presented a threat of further imprisonment for an unknown period and obscured the probable date of a prisoner's return to society. That was seen as impeding the ability of prison officials to develop an effective institutional treatment plan for that inmate (*see*, Letter of Deputy Commr of NY St Dept of Correction, Bill Jacket, L 1957, ch 524). Additionally, concern was expressed that detainees, considered higher security risks, were denied full access to rehabilitation programs, educational opportunities, vocational training and recreational privileges (*see*, Note, *The Interrelationship Between Habeas Corpus and Prosequendum, the Interstate Agreement on Detainers, and the Speedy Trial Act of 1974: United States v Mauro*, 40 U Pitt L Rev 285, 289-290).

prisoner's first sentence was served, memories had faded, events had lost their perspective, witnesses had disappeared and evidence had been lost or destroyed (*see, e.g., Dickey v Florida*, 398 US 30). Designed to change this delay-ridden system, the IAD's state purpose is to encourage the orderly, expeditious disposition of untried accusatory instruments by providing cooperative procedures for securing the transfer of defendants incarcerated in other States (CPL 580.20, art I).

In furtherance of its objective, the IAD specifies extradition procedures, fixes speedy trial periods and mandates severe penalties for noncompliance. Under article III, which applies here, a prisoner may request final disposition of untried charges, thereby initiating transfer to the jurisdiction where the charges are pending (CPL 580.20, art III[a]). Once the prosecuting officer and the appropriate court receive notice of such a request, the prisoner must be brought to trial within 180 days. That period gives the prosecutor "ample time to proceed * * * yet it is short enough to give the prisoner ground to expect that his status can be determined within a measurable and reasonable period" (1957 NY Legis Doc No. 46, Appendix III-A, at 177-178).

Where a defendant is not brought to trial within the statutory period, the IAD requires that an indictment be dismissed with prejudice (CPL 580.20, art V[c]; *see, United States v Ford*, 550 F2d 732, 743-744 [2d Cir], *affd sub nom. United States v Mauro*, 436 US 340). Although the penalty of dismissal is by its terms mandatory, the IAD provides two exceptions: the request for speedy disposition of the charges is void if the prisoner escapes from custody, and the court may grant reasonable and necessary continuances, but only for good cause shown in open court with the prisoner or his attorney present (CPL 580.20, art III[a], [f]; art IV[c]). Thus, where there is a period during which the court hears and decides

defense motions, that period will be excluded from the speedy trial time on the ground that such delay constitutes a necessary or reasonable continuance (*see*, *People v Torres*, 60 NY2d 119, 127-128). In the present case, the period from May 18, 1994 (when the case was adjourned for defense motions) to December 5, 1994 (when the court rendered a decision on those motions) was excludable on that basis (CPL 580.20, art III[a]).

A closer question, however, is whether the 55-day delay from January 9, 1995 (when the parties appeared in court to fix a trial date) to April 17, 1995 (when defendant filed his motion to dismiss the indictment) should also be excluded from calculation of the 180-day speedy trial period. The problem arises because, as noted above, defendant concurred in the May 1 trial date suggested by the court and agreed to by the prosecution, even though that date was beyond the statutory period. We conclude, however, that defense counsel's concurrence did not constitute a waiver of defendant's statutory right to a speedy trial.

Under the IAD, defendants have a single responsibility: to notify prison officials of their request to be brought to trial on the pending out-of-State charges (CPL 580.20, art III[b]). Otherwise, the burden of complying with statutory requirements falls upon the respective officials involved. Thus, ensuring that a defendant is brought to trial within the mandated speedy trial period is the responsibility of prosecutors and courts, not defendants (*see*, *e.g.*, *United States v Ford*, 550 F2d 732, 743, *supra* [Trial Judge has responsibility to reassign cases to assure defendants their right to a speedy trial]).

From the statutory language and objectives it follows that the IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent with those rights (*Brown v Wolff*, 706 F2d 902, 907 [9th Cir]). Indeed, to impose

such an obligation on defendants would be to shift the burden of compliance with the IAD from State officials, where the Legislature very deliberately placed it. Such a shift would diminish the statute's effectiveness and enforceability (*see*, *United States v Eaddy*, 595 F2d 341, 345 [6th Cir]).

Speedy trial rights guaranteed by the IAD may, of course, be waived by a defendant. Generally, such waiver may be accomplished explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights (*see*, *United States v Odom*, 674 F2d 228, 230 [4th Cir], *cert denied* 457 US 1125 [waiver by defendant's request for an adjournment]; *United States v Ford*, 550 F2d 732, *supra* [waiver by defendant's request to be returned to Massachusetts prior to his trial]; *United States v Scallion*, 548 F2d 1168 [5th Cir], *cert denied* 436 US 943 [defendant estopped from asserting an IAD violation because return to New York was at his own request in order to be present for a parole hearing]; *see also*, *People v Torres*, 60 NY2d, at 125, *supra*; *see also*, *People v Prosser*, 309 NY 353, 358).

In *United States v Eaddy* (595 F2d 341, *supra*), for example, defense counsel indicated that he "did not care" where his client was held pending trial on Federal charges. Thereafter, in contravention of the IAD's anti-shuttling provisions, authorities transferred defendant back and forth between Federal and State prisons (*id.*, at 343). The court held that defendant did not waive his IAD rights by failing to state a preference as to his place of incarceration (*see also*, *People v Allen*, 744 P2d 73 [Colo.] [defendant's agreement to trial dates set beyond statutory time period held insufficient to support a finding of waiver]).

Similarly, where, as here, the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution, and that date fell outside the 180-day statutory

period, no waiver of his speedy trial rights was effected. Defendant's mere concurrence in the suggested date did not constitute an affirmative request for a trial date beyond the speedy trial period. Moreover, it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements. Because defendant was not brought to trial within the 180-day period, the indictment must be dismissed in accordance with the mandate of IAD article V(c).

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to dismiss the indictment granted and the indictment dismissed.

Judges **BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY concur.**
Order reversed, etc.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1277

PRESENT: DENMAN, P.J., GREEN, WISNER, BALIO AND BOEHM, JJ.

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MICHAEL HILL, APPELLANT.
Indictment No: 160/94

Michael Hill having appealed to this Court from the judgment of the Monroe County Court, entered in the Monroe County Clerk's office on June 8, 1995, and said appeal having been argued by Stephen Bird of counsel for appellant, Robert Mastrocola of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed for reasons stated in decision at Monroe County Court, Egan, J.

Entered: November 19, 1997 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1277. (Monroe Co.) – PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL HILL, APPELLANT. – Judgment unanimously affirmed for reasons stated in decision at Monroe County Court , Egan, J. (Appeal from Judgment of Monroe County Court, Egan, J. - Murder, 2nd Degree.) PRESENT: DENMAN, P.J., GREEN, WISNER, BALIO AND BOEHM, JJ. (Filed Nov. 19, 1997.)

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v DWAIN REID, Also Known as MICHAEL HILL, Defendant.

County Court, Monroe County, May 2, 1995

APPEARANCES OF COUNSEL

Edward J. Nowak, Public Defender of Monroe County (*Edward F. Scanlon* of counsel), for defendant. *Howard R. Relin, District Attorney* of Monroe County (*Gregory Huether* of counsel), for plaintiff.

OPINION OF THE COURT

DAVID D. EGAN, J.

Indictment No. 160, filed March 11, 1994, accuses defendant of one count of murder in the second degree and one count of robbery in the first degree. In a motion filed April 17, 1995, defendant moves to dismiss the indictment pursuant to the Interstate Agreement on Detainers (IAD). On April 24, 1995, the People filed answering papers opposing defendant's motion to dismiss.

The IAD, codified in CPL 580.20, is a compact among States that establishes the available methods of securing the attendance of defendants confined as prisoners in other States. Its purpose, as set forth in article I, is to encourage the expeditious and orderly disposition of untried indictments by providing cooperative procedures for the transfer of prisoners between States.

The statute sets forth two procedures for initiating the transfer of a prisoner. Under article III, the prisoner may initiate the transfer by making a request for "final disposition" of an untried indictment, information or complaint. Where this

procedure is used, the defendant must be brought to trial within 180 days of the request. A second procedure is authorized by article IV, which provides that the District Attorney in the State where the untried indictment, information or complaint is pending may initiate the transfer by presenting a written request for "temporary custody or availability" to the authorities of the State in which the prisoner is incarcerated. Where the District Attorney initiates the transfer, the defendant must be brought to trial within 120 days of his arrival in the receiving State.

The IAD mandates a dismissal of the indictment where the defendant is not brought to trial within the applicable statutory period. However, when calculating whether the defendant's rights under the IAD have been violated, the court must exclude certain delays which are not attributable to the People. The running of the time period is tolled when the court grants "any necessary or reasonable continuance" upon a showing of "good cause * * * in open court". (Art III [a]; art IV[c].) The running of the time is also tolled whenever the defendant is "unable to stand trial" as determined by the court (art VI). Finally, the facts in a particular case may warrant a finding that a delay is excludable because the defendant has abandoned, or waived, his rights under the IAD. (*People v Torres,* 60 NY2d 119, 124.)

The case before this court is governed by article III of the IAD. On December 30, 1993, while defendant was incarcerated as a sentenced prisoner in Grafton, Ohio, a detainer was lodged against him accusing him of having committed the crimes of murder in the second degree and robbery in the first degree in Monroe County, New York. On January 4, 1994, defendant signed a request for final disposition of the Monroe County charges. Pursuant to article III of the IAD, the People had 180 days from the date of defendant's request to bring him to trial. (*See*, art III[a]; *see*

also, People v Torres, supra, at 123; *People v C'Allah*, 100 AD2d 754.)

In this case, 468 days elapsed from January 4, 1994, the date defendant signed the request, to April 17, 1995, the date defendant filed his motion to dismiss. The court must now consider whether any of the delay is excludable. The following dates are relevant to that determination:

January 4, 1994	Defendant signs request for disposition
January 10, 1994	Request delivered to court and prosecutor
May 13, 1994	Defendant delivered to the Monroe County Jail
May 18, 1994	Defendant arraigned, case adjourned for defense motions
July 12, 1994	Defendant files motions
July 29, 1994	Motions argued, court orders pretrial hearings
August 19, 1994	Hearings commenced
October 12, 1994	Hearings completed
December 5, 1994	Court renders written decision
January 9, 1995	Trial scheduled for May 1, 1995
April 17, 1995	Defendant files motion to dismiss pursuant to IAD

The court finds that the entire 133-day delay from January 4, 1994, the date defendant requested disposition of the Monroe County charges, to May 18, 1994, the date defendant was arraigned in Monroe County Court, is chargeable to the People. There is no authority to support the People's contention that the delay attributable to the process necessary in returning a prisoner is excludable.

The entire delay from May 18, 1994, the date the matter was adjourned for defense motions, to December 5, 1994, the date the court rendered a decision on the motions, may properly be attributed to the filing and disposition of defense motions.

Consequently, the delay may be excluded as a "necessary or reasonable continuance" under article III and/or as a time that defendant "is unable to stand trial" under article VI. (*See, People v Torres, supra*, at 126-127; *People v Delaney*, 121 AD2d 650; *People v Chiofalo*, 73 AD2d 673.)

The 34-day delay from December 5, 1994 to January 9, 1995 is chargeable to the People. Notably, the People have advanced no reason which would justify the exclusion of this period. When combined with the earlier delays chargeable to the People, the time chargeable to the People from defendant's request for disposition to January 9 totals 167 days. This case turns, then, on whether the People are to be charged with the 55-day delay from January 9, 1995, the date the case was scheduled for trial, to April 17, 1995, the date defendant filed his motion to dismiss the indictment.

On January 9, 1995, the following colloquy took place:

"MR. PROPSPERI: Your honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date, and Mr. Huether says that would fit in his calendar.

"THE COURT: How is that with the defense counsel?

"MR. SCANLON: That will be fine, Your Honor."

The court finds that defendant waived his right to a trial within the 180-day period by concurring in the decision to set a trial date beyond the statutory period. The Court of Appeals has held that "[t]he facts in a particular instance may warrant a factual determination that the defendant has elected not to assert or has abandoned his rights under the Agreement on Detainers and has chosen to proceed to disposition with reference thereto" (*People v Torrres, supra*, at 124). Courts in

this State have found an abandonment, or waiver, of a defendant's rights under the IAD in myriad of circumstances (*see, Matter of Amiger v Long*, 101 AD2d 616; *People v Lambert*, 61 NY2d 978; *People v Gooden*, 151 AD2d 773; *People v Sacco*, 199 AD2d 288). Although the precise issue before this court has not been determined by a court in New York State, courts in other jurisdictions have held that a defendant who concurs in a decision to set a trial date beyond the statutory period waives his rights under the IAD. *People v Jones* (495 NW2d 159, 160-161, 197 Mich App 76 [1992]) merits quotation: "A waiver is established when a defendant, either expressly or impliedly, agrees or requests to be treated in a manner contrary to the terms of the IAD * * *. Valid waivers have been found where either the defendant or his attorney agree to a continuance or a later trial date * * * To avoid waiving any rights under the IAD, the defendant must generally object to those procedures or actions by the trial court that may infringe upon the protections afforded by the IAD * * * [c]onduct that is inconsistent with the IAD will be viewed as establishing a waiver of statutory rights."

Here, defendant, defense counsel and a representative from the District Attorney's office were present at the time the trial date was set. The court sought input from both attorneys with respect to the proposed trial date. (*Cf., People v Allen*, 744 P2d 73 [Colo 1987].) Had counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period. Defense counsel's explicit agreement to the trial date set beyond the 180-day statutory period constituted a waiver or abandonment of defendant's rights under the IAD. Consequently, the entire delay from January 9, 1995 to April 17, 1995 is excludable.

Finally, the delay from April 17, 1995 to the date of this decision is also excludable. Defendant's filing of a motion to

dismiss pursuant to the IAD tolls the statute (*United States v Dawn*, 900 F2d 1132, 1136 [7th Cir 1990]).

For the reasons stated above, the court concludes that the delay chargeable to the People does not exceed 180 days.

Accordingly, defendant's motion to dismiss the indictment is denied.

§580.20 Agreement on detainers

The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

TEXT OF THE AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner detainers based on untried indictment, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person had entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer had been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commission of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of this body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he had lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or compliant shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the

sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons thereof.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall

enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner the appropriate authority in receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complain on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment,

information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untired indictments, informations or complaints which form the basis of the detainer or detainers of for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments,

informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as

to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstances shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

3. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purposes.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape

from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article VII of the agreement on detainers.

7. In order to implement Article IV(a) of the agreement on detainers, and in furtherance of its purposes, the appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request, notify the prisoner and the governor in writing that a request for temporary custody had been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his delivery.